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SUPREME COURT
STATE OF WASHINGTON

No. 2 267024

2009 JUN 23 P 4: 03

BY RONALD R. CARPENTER

SUPREME COURT

CLERK

OF THE STATE OF WASHINGTON

COLUMBIA PHYSICAL THERAPY, INC., P.S.,

Petitioner – Cross-Respondent,

v.

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C.;
BENTON FRANKLIN PHYSICAL THERAPY, INC.; THOMAS R.
BURGDORFF; CHRISTOPHER A. KONTOGIANIS; ARTHUR E.
THIEL; DAVID W. FISCHER; HEATHER L. PHIPPS; RODNEY
KUMP; JAY WEST; and DOES 1 through 9,

Respondents – Cross-Petitioners.

JOINT MOTION FOR DISCRETIONARY REVIEW

DARRIN E. BAILEY
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DANFORD D. GRANT
WSBA #26042
STAFFORD FREY COOPER
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Attorneys for Petitioner

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Attorneys for Respondents
– Cross-Petitioners

ORIGINAL

A. IDENTITY OF PETITIONERS

Petitioner/Cross-Respondent Columbia Physical Therapy, Inc., P.S., (hereinafter "Columbia"), by and through its attorneys Darrin E. Bailey and Danford D. Grant of Stafford Frey Cooper and Respondents/Cross-Petitioners Benton Franklin Orthopedic Associates, P.L.L.C., Benton Franklin Physical Therapy, Inc., Thomas R. Burgdorff, Christopher A. Kontogianis, Arthur E. Thiel, David W. Fischer, Heather L. Phipps, Rodney Kump, Jay West and Does 1 through 9 (collectively referred to hereinafter as "Benton Franklin"), by and through their attorneys, Michael H. Church and Matthew T. Ries of Stamper Rubens, P.S., jointly petition this Court to accept review of the decision designated in Part B of this motion.

B. DECISION BELOW

All parties to this lawsuit seek review of the May 23, 2008, Court of Appeals, Division III, Order Denying Motion to Modify Commissioner's Ruling. Appendix at p. A-1. The Commissioner's ruling denied the parties' cross-motions for discretionary review of Benton County Superior Court rulings that the trial judge certified for appellate review and that the parties stipulated should be reviewed. Appendix at pp. A-2 to A-3.

C. ISSUES PRESENTED FOR REVIEW

1. By declining appellate review of decisions that are of significant public importance and were certified for review by the trial court, has the Court of Appeals committed probable error that substantially limits the freedom of a party to act?

2. By declining appellate review of decisions that are of significant public importance and were certified for review by the trial court, has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by the Supreme Court.

D. STATEMENT OF THE CASE

This is a case alleging violations of the anti-rebate statute (RCW Chapter 19.68), the professional limited liability company act (RCW Chapter 25.15), the common law corporate practice of medicine doctrine, and the Consumer Protection Act (RCW Chapter 19.86).

The case has garnered national interest from both the American Medical Association and the American Physical Therapy Association. All parties and others across the state are likely waiting for the outcome of this case to determine the legality of their current or proposed business arrangements and professional practices. There is no doubt that this case

will be appealed to the Court of Appeals and perhaps the Supreme Court following a trial next year. Nevertheless, recognizing that a trial is unnecessary to resolve the dispositive and purely legal issues in this case, both parties stipulated to immediate appellate review of the trial court's summary judgment decisions, and the trial court certified those decisions for appeal. To require a trial under these circumstances will unnecessarily delay resolution of important issues of statewide concern, and waste judicial and party resources.

Specifically, this case involves several questions of law concerning whether a physician-owned company providing orthopedic services to patients can also employ physical therapists to provide physical therapy to patients. Benton Franklin, the defendant in the underlying lawsuit (along with several individual physicians and employee physical therapists), is a physician-owned professional limited liability company in Kennewick, Washington, which, in addition to its orthopedic practice, employs several physical therapists. Columbia, the plaintiff in the underlying lawsuit, is a professional services corporation owned by physical therapists which also employs physical therapists through several offices, including one in Kennewick, Washington.

In its Complaint (Appendix at pp. A-4 to A-7), Columbia alleges that the receipt by Benton Franklin and its physicians of any form of profit

flowing from the referral of patients for physical therapy violates RCW § 19.68.010. Appendix at p. A-6. Columbia also contends that Benton Franklin's receipt of profits from physical therapy services violates Washington's Consumer Protection Act. Appendix at pp. A-6 to A-7. Columbia subsequently amended its Complaint and added claims alleging that Benton Franklin's practice of employing physical therapists violates the Professional Services Corporation Act and the corporate practice of medicine doctrine. Appendix at pp. A-8 to A-21.

Columbia and Benton Franklin cross-moved for summary judgment on Columbia's claims, including the application of Washington's anti-rebate statute (RCW Chapter 19.68). With regard to this claim, the Washington Supreme Court's decision in Day v. Inland Empire Optical, 76 Wn.2d 407, 456 P.2d 1011 (1969) became a focal point of the dispute, with significant disagreement between the parties regarding the meaning and application of the Court's prior decision. The parties also differed in their interpretation of RCW § 19.68.040.

The parties further disagreed about the application of the common law corporate practice of medicine doctrine to this case, and the application of Washington's Professional Services Corporation Act RCW § 18.100 et seq. to this case (applied in this case through the Professional Limited Liability Company Act, which imposes the requirements of RCW

Chapter 18.100 on PLLCs).

The trial court granted Benton Franklin's motion with regard to Columbia's Professional Services Corporation Act claim, denied both parties' motions with regard to the Anti-Rebate Statute claim, and declined to rule on both parties' motions regarding the common law corporate practice of medicine doctrine claim, although the parties agreed that there were no material facts in dispute related to this claim. Appendix at p. A-23. The parties stipulated that discretionary review was appropriate and on December 17, 2007, the court certified its summary judgment orders for discretionary review. Appendix at pp. A-25 to A-28.

The parties subsequently filed their cross-motions for discretionary review. Although neither party disagreed that the basic issue for resolution was the legal question of whether a company owned by physicians that provides physician services to the public could also employ physical therapists to provide physical therapy services to the public, the parties initially took different approaches to how they presented the issues for review. Accordingly, the Commissioner denied the cross-motions for discretionary review, incorrectly concluding that "... since the parties now disagree on what issues in the case were certified and should be decided by this Court, it appears that acceptance of discretionary review would not 'materially advance the ultimate termination of litigation' as set forth in

RAP 2.3(b)(4).” Appendix at p. A-2.

In response, the parties agreed on the specific framing of the certified issues and filed a joint motion to modify the Commissioner’s ruling. Appendix at pp. A-29 to A-37. In their joint motion, the parties listed the following four key legal questions they agreed the appeals court should review:

1. The trial court’s denial of Plaintiff’s motion for summary judgment on its RCW 25.15.045 and RCW 18.100 claim, and the trial court’s granting of Defendants’ motion for summary judgment to dismiss Plaintiff’s RCW 25.15.045 and RCW 18.100 claim against Defendants, which requires ruling on the following legal question: As a matter of law, does RCW 25.15 (RCW 18.100) prohibit a single PLLC from providing both physician and physical therapy services to the public?
2. The trial court’s determination on both parties’ motions for summary judgment on Plaintiff’s common law corporate practice of medicine doctrine claim, which requires ruling on the following legal question: As a matter of law, does Washington’s Corporate Practice of Medicine Doctrine (or corporate practice of a learned profession doctrine) prohibit a physician-owned PLLC from

providing physical therapy services to the public through licensed employees?

3. The trial court's denial of Plaintiff's motion for summary judgment on its Chapter 19.68 RCW claim, and the trial court's denials of Defendants' motions for summary judgment to dismiss Plaintiff's Chapter 19.68 RCW claim, which requires ruling on the following legal questions:

- a. As a matter of law, do Defendants receive "a rebate, refund, commission, unearned discount or profit" in connection with the referral of patients or the furnishing of care as contemplated under RCW 19.68?
- b. As a matter of law, do Defendants actions in this case constitute a "referral" as contemplated under RCW 19.68?
- c. If the answer to 1.a and/or 1.b is in the affirmative, then as a matter of law, does the exception in RCW § 19.68.010(2) apply in this case?
- d. As a matter of law, does RCW 19.68.040 apply only to similarly licensed professionals?
- e. As a matter of law, under RCW 19.68.040 does the "direct and immediate supervision" test set forth in *Day v. Inland*

Empire Optical, Inc., 76 Wn.2d 407, 456 P.2d 1011 (1969)

apply in this case?

- f. If the answer to 1.e is in the affirmative, then as a matter of law, can Defendants satisfy the “direct and immediate supervision” test set forth in *Day*?
 - g. As a matter of law, do Defendants meet the “exception” set forth in RCW 19.68.040?
4. The trial court’s denial of Defendants’ motions for summary judgment to dismiss Plaintiff’s Chapter 19.86 RCW Consumer Protection Act claim, which requires ruling on the following legal questions:
- a. As a matter of law, do defendants engage in “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” in violation of Chapter 19.86 RCW?
 - b. As a matter of law does Plaintiff have standing to bring a CPA claim in this case?
 - c. As a matter of law, is the CPA claim a stand alone claim if there is no violation of RCW 19.68 et seq.?
 - d. As a matter of law, does the DOH investigation constitute a “specifically permitted” exception in RCW § 19.86.170?

Asking the Court of Appeals to modify the Commissioner's ruling and accept review, the parties pointed out that no appellate case in Washington has directly addressed the issues in this case and that, to the best of their knowledge, only two reported cases in Washington have ever addressed claims under Washington's anti-rebate statute. Furthermore, no reported cases in Washington have addressed the questions in this case concerning whether Benton's Franklin's practice of employing physical therapists to provide physical therapy to patients violates either the corporate practice of medicine doctrine or the Professional Services Corporation Act (or Professional Limited Liability Act).

Thus, the primary disagreement between the parties relates to their differing interpretations of the applicable statutory and common law in Washington. Immediate review of these purely legal issues would therefore materially advance the ultimate termination of this litigation. The Court of Appeals disagreed, however, and on May 23, 2008, issued its Order Denying Motion to Modify Commissioner's Ruling. Appendix at p. A-1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- 1. The Court of Appeals committed probable error in denying the parties' joint motion to modify the Commissioner's decision to deny the parties' cross-motions for discretionary review because it substantially altered the status quo or substantially limited the freedom of a party to act.**

At this point in the litigation, the only impediments to resolution of this dispute are questions of law. Realizing this, the parties stipulated that the trial court should certify the above-listed questions of law for immediate review pursuant to RAP 2.3(4)(b). As noted above, however, the Commissioner believed the parties disagreed on the issues for review and the scope of review. The parties therefore filed a joint motion to modify the Commissioner's ruling in which they stipulated to the specific agreed-upon issues that they wanted the Court of Appeals to review.

By refusing to modify the Commissioner's ruling and accept the case for review, the Court of Appeals committed probable error by failing to recognize that the dispute involved only controlling issues of law which, if immediately reviewed, would materially advance the ultimate termination of litigation, that the lower court certified the case for review, and that the case presented significant issues of statewide importance to which professionals across the state need an answer.

While the Court of Appeals' refusal to accept discretionary review does not alter the status quo, it does substantially limit the freedom of the

parties to act. As the parties, as well as the trial court, recognized, further litigation in this matter is essentially a waste of resources until the fundamental legal questions are resolved. By denying discretionary review, the Court of Appeals has now effectively locked the parties into proceeding through trial so that they can seek review again. It also affects the ability of the parties (and presumably many others across the state) to alter or expand their business arrangements without risking non-compliance with the law.

Because the only impediment to resolution in this matter is the lack of appellate answers to purely legal questions, immediate review will resolve this matter. By taking this option away, the Court of Appeals has committed a probable error which has limited the freedom of the parties to act and therefore the Washington Supreme Court should accept discretionary review and reverse the Court of Appeals' decision.

2. **In refusing to modify the Commissioner's ruling, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by the Supreme Court.**

Although trial court orders denying summary judgment are not generally appealable, RAP 2.3(4)(b) permits an appellate court to grant discretionary review if:

The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a

controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

See, e.g., French v. Uribe, Inc., 132 Wn. App. 1, 7, 130 P.3d 370 (2006).

As seen in the trial court's December 17, 2007, Stipulation and Order to Stay Proceedings and Certify Decisions for Discretionary Review, the superior court has certified, and all the parties have stipulated, that the trial court's orders on summary judgment are appropriate for discretionary review.

Given that the trial court and both parties have agreed that the summary judgment orders are appropriate for discretionary review, the accepted and usual course of judicial proceedings would have been for the Court of Appeals to accept discretionary review.

Admittedly, not accepting review would normally fall within the Court of Appeals' discretion. In this case, however, the overwhelming issues of statewide importance related to the resolution of purely legal issues renders the Court of Appeals' exercise of discretion especially unusual, calling for the Supreme Court to act and accept review, or require the Court of Appeals to accept review. Thus, the Court of Appeals refusal to accept review and instead require the parties to proceed through trial, so far departs from this usual and accepted course of judicial proceedings

(under these specific circumstances) as to call for the exercise of revisory jurisdiction by the Washington Supreme Court.

F. CONCLUSION

For the reasons state above, Columbia and Benton Franklin respectfully ask this Court to accept discretionary review and reverse the Court of Appeals' decision to deny discretionary review.

RESPECTFULLY SUBMITTED this 23rd day of June 2008.

STAMPER RUBENS, P.S.

By:

 wsbn 26042 for:

MICHAEL H. CHURCH

WSBA#24957

MATTHEW T. RIES

WSBA #29407

Attorneys for Respondents/
Cross-Petitioners

STAFFORD FREY COOPER

By:



DARRIN E. BAILEY

WSBA#34955

DANFORD D. GRANT

WSBA #26042

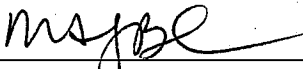
Attorneys for Petitioner/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Court of Appeals, Division III
State of Washington
500 N. Cedar Street
Spokane WA 99201

<input type="checkbox"/>	U.S. Mail, Postage Prepaid
<input checked="" type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Telecopy (Facsimile)
<input type="checkbox"/>	Email



Mary Ann J. Blackledge

APPENDIX

FILED

MAY 23 2008

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

**COLUMBIA PHYSICAL THERAPY,
INC., P.S.,**

Petitioner/Cross-Respondent,

v.

**BENTON FRANKLIN ORTHOPEDIC
ASSOCIATES, P.L.L.C.; BENTON
FRANKLIN PHYSICAL THERAPY,
INC.; THOMAS R. BERGDORFF;
CHRISTOPHER A. KONTOGIANIS;
ARTHUR E. THIEL; DAVID W. FISCHER;
HEATHER L. PHIPPS; RODNEY KUMP;
JAY WEST; and DOES 1 through 9,**

Respondents/Cross-Petitioners.

No. 26702-4-III

**ORDER DENYING
MOTION TO MODIFY
COMMISSIONER'S RULING**

Having considered Columbia Physical Therapy's and Benton Franklin Orthopedic Associates' joint motion to modify the commissioner's ruling of March 12, 2008, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

DATED: May 23, 2008

FOR THE COURT:


JOHN A. SCHULTHEIS
CHIEF JUDGE

*The Court of Appeals
of the
State of Washington
Division III*

FILED

MAR 12 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COLUMBIA PHYSICAL THERAPY, INC.,)
P.S.,)

Petitioner/Cross-Respondent,)

v.)

BENTON FRANKLIN ORTHOPEDIC)
ASSOCIATES, P.L.L.C.; BENTON)
FRANKLIN PHYSICAL THERAPY, INC.;)
THOMAS R. BURGDORFF;)
CHRISTOPHER A. KONTOGIANIS;)
ARTHUR E. THIEL; DAVID W. FISCHER;)
HEATHER L. PHIPPS; RODNEY KUMP;)
JAY WEST; and DOES 1 through 9,)

Respondents/Cross-Petitioners.)

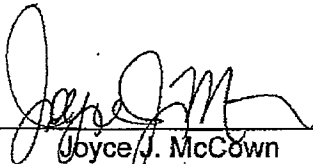
COMMISSIONER'S RULING
No. 26702-4-III

Having considered the parties' motions for discretionary review of decisions of the Benton County Superior Court, the responses and replies thereto, the record, file, and oral argument of counsel, and being of the opinion that even though the trial court has certified this matter to this Court and the parties so stipulated pursuant to RAP 2.3(b)(4), since the parties now disagree on what issues in the case were certified and should be decided by this Court, it appears that acceptance of discretionary review would not "materially advance the ultimate termination of the litigation" as set forth in RAP 2.3(b)(4); now therefore,

No. 26702-4-III

IT IS ORDERED, the motion for discretionary review is denied.

March 12, 2008.



Joyce J. McCown
COMMISSIONER

E. KAY STAPLES
BENTON COUNTY CLERK

AUG 19 2005

FILED

SUPERIOR COURT OF WASHINGTON IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

v.

BENTON FRANKLIN ORTHOPEDIC
ASSOCIATES, P.L.L.C.; THOMAS R.
BURGDORFF; CHRISTOPHER A.
KONTOGIANIS; ARTHUR E. THIEL;
DAVID W. FISCHER; HEATHER L.
PHIPPS; and DOES 1 through 9,

Defendants.

No. 05-2-01909-1

COMPLAINT

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1 Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2 Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington corporation doing business in the State of Washington.

COMPLAINT - 1

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COPY

1 1.3. Defendants Thomas R. Burgdorff, M.D.; Christopher A. Kontoglanis, M.D.;
2 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; and Heather L. Phipps, D.O. are the
3 physician-owners of BFOA and Benton Franklin Physical Therapy, Inc. (BFPT).

4 1.4 Other defendants, corporate or otherwise, designated as Does 1 through
5 9, are presently unknown to plaintiff, who therefore sues said defendants by such
6 fictitious names. Plaintiff is informed, believes and thereon alleges that each of the
7 defendants fictitiously named herein as a Doe are legally responsible in some manner
8 for the statutory violations hereinafter alleged. Plaintiff will seek to amend this
9 Complaint to insert the true names and/or capacities of said fictitiously named
10 defendants if and when the same have been ascertained.

11 II. JURISDICTION AND VENUE

12 2.1. This Court has jurisdiction over the parties and the subject matter of this
13 lawsuit. Venue is proper in Benton County, Washington under RCW 4.12.025 as
14 Defendant corporation resides in Benton County.

15 III. FACTUAL BACKGROUND

16 3.1. BFOA is a physician-owned orthopedic clinic located in Kennewick,
17 Washington. BFOA was incorporated on November 19, 1999, and is owned by the
18 following physicians: Thomas R. Burgdorff, M.D.; Christopher A. Kontoglanis, M.D.;
19 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; Heather L. Phipps, D.O.; and John and/or
20 Jane Does 1-9.

21 3.2. These physicians also own and operate Benton Franklin Physical
22 Therapy, Inc. (BFPT). BFPT is also located in Kennewick, and was incorporated on
23 January 21, 2003. As a consequence of their ownership of BFPT, Defendant

COMPLAINT - 2

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1 physicians have legal, financial, and managerial control over BFPT, to include the right
2 to keep profits derived from BFPT's provision of medical treatment to patients.

3 3.3. Defendant physicians refer patients for physical therapy to BFPT and the
4 profits of this treatment inure to said Defendant physicians. Defendants' referral of
5 patients to their own corporation unfairly reduces the number of patients seen by other
6 physical therapy clinics, including Plaintiff Columbia. Such referrals are unlawful under
7 Washington's anti-rebate statute, constitute unprofessional conduct, and otherwise
8 violate Washington's Consumer Protection Act.

9 IV. CAUSES OF ACTION

10 4.1. RCW 19.68.010—anti-rebate. Beginning at least as early as 2003, the
11 exact date being unknown to Plaintiff, and continuing up to and including the date of this
12 Complaint, Defendants unlawfully referred patients to BFPT. Given Defendant
13 physicians' status as sole shareholders of BFPT, any profits or other gain BFPT derives
14 from providing physical therapy to patients inure to those physicians. Such an
15 arrangement violates RCW 19.68.010, which prohibits the receipt by Defendants of any
16 form of profit flowing from the referral of patients for medical treatment.

17 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.
18 Likewise, Defendants' receipt of any profits or other valuable consideration resulting
19 from its ownership of BFPT constitutes unprofessional conduct under RCW 19.68.020
20 and RCW 18.130.180.

21 4.3. RCW 19.68.020—Consumer Protection. Furthermore, Defendants'
22 business practices violate Washington's Consumer Protection Act. Specifically,
23 Defendants engaged in unfair acts and methods of competition when they created a

COMPLAINT - 3

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1 physical therapy corporation to which they could refer patients. Defendants unlawfully
2 refer patients to their own corporation, thus unfairly reducing the referrals to other area
3 physical therapists, including Plaintiff Columbia.

4 **V. PRAYER FOR RELIEF**

5 WHEREFORE, Columbia requests the following relief:

6 5.1. For judgment in favor of Columbia and against Defendants granting
7 injunctive relief against Defendants preventing further violations of RCW 18.130.180 (as
8 allowed under RCW 18.130.185);

9 5.2. For judgment in favor of Columbia and against Defendants disciplining
10 Defendants for violating RCW 19.88.020 (as allowed under RCW 19.88.030);

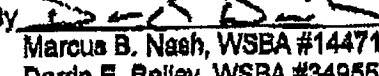
11 5.3. For judgment in favor of Columbia and against Defendants for treble
12 damages and attorney fees resulting from Defendants' unfair acts and methods of
13 competition, in an amount to be proven at trial (as allowed under RCW 19.88.090);

14 5.4. For Columbia's attorneys' fees and costs incurred herein;

15 5.5. For such other and further relief as the Court deems just and equitable.

16
17 DATED this 11th day of August, 2005.

18 STAFFORD FREY COOPER

19
20 By 
21 Marcus B. Nash, WSBA #14471
22 Darrin E. Bailey, WSBA #34955
23 Attorneys for Plaintiff

COMPLAINT - 4
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The Honorable Dennis Yule

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

v.

BENTON FRANKLIN ORTHOPEDIC
ASSOCIATES, P.L.L.C.; BENTON
FRANKLIN PHYSICAL THERAPY, INC.;
THOMAS R. BURGDORFF; CHRISTOPHER
A. KONTOGIANIS; ARTHUR E. THIEL;
DAVID W. FISCHER; HEATHER L. PHIPPS;
RODNEY KUMP; JAY WEST; and DOES 1
through 9,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S SECOND AMENDED
COMPLAINT

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1. Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2. Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington Professional Limited Liability Company doing business in the State of Washington as a medical office.

PLAINTIFF'S SECOND AMENDED COMPLAINT - 1
10268-027034 167656

COPY

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1 1.3. Defendant Benton Franklin Physical Therapy, Inc. (BFPT) is a Washington
2 corporation doing business in the State of Washington as a physical therapy practice.
3 State records indicate BFPT's corporate license expired on January 31, 2005; however
4 BFOA advertises that it continues to do business as "Benton Franklin Physical
5 Therapy."

6 1.4. Defendants Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
7 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; and Heather L. Phipps, D.O. are licensed
8 to practice medicine in the State of Washington. They are the physician-owners of
9 BFOA and Benton Franklin Physical Therapy (BFPT).

10 1.5. Defendants Rodney D. Kump, D.P.T. and Jay M. West, M.P.T. are
11 physical therapists at Benton Franklin Physical Therapy, and/or Benton Franklin
12 Orthopedic Associates d/b/a Benton Franklin Physical Therapy. Kump and West are
13 licensed to practice physical therapy in the State of Washington.

14 1.6. Other defendants, corporate or otherwise, designated as Does 1 through
15 9, are presently unknown to plaintiff, who therefore sues said defendants by such
16 fictitious names. Plaintiff is informed, believes and thereon alleges that each of the
17 defendants fictitiously named herein as a Doe are legally responsible in some manner
18 for the statutory violations hereinafter alleged. Plaintiff will seek to amend this
19 Complaint to insert the true names and/or capacities of said fictitiously named
20 defendants if and when the same have been ascertained.

II. JURISDICTION AND VENUE

2.1. This Court has jurisdiction over the parties and the subject matter of this lawsuit. Venue is proper in Benton County, Washington under RCW 4.12.025 as Defendants reside in Benton County.

III. FACTUAL BACKGROUND

3.1. BFOA is a physician-owned medical practice providing orthopedic medical treatment to patients. BFOA's main office is located at 911 South Washington Street in Kennewick, Washington. BFOA was formed in November 1999, and is owned by the following physicians: Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.; Arthur E. Thiel, M.D.; David W. Fischer, M.D.; Heather L. Phipps, D.O; and John and/or Jane Does 1-9.

3.2. Defendant physicians also own and operate Benton Franklin Physical Therapy, Inc. (BFPT) and/or a "BFOA physical therapy office" located at 15 W 10th Avenue in Kennewick. BFPT was incorporated on January 21, 2003. BFPT's corporate license apparently expired on January 31, 2005, and now BFOA advertises that "Benton Franklin Orthopedic Associates. DBA Benton Franklin Physical Therapy." As a consequence of their ownership of BFPT, Defendant physicians have legal, financial, and managerial control over BFPT and/or the BFOA physical therapy office, to include the right to keep profits derived from BFPT's and/or the BFOA physical therapy office's physical therapy treatment of patients.

3.3. Defendant physicians refer patients for physical therapy to BFPT and/or the BFOA physical therapy office and the profits of this treatment inure to Defendant

1 physicians. Defendant physical therapists receive compensation from Defendant
2 physicians for providing physical therapy care to their patients.

3 3.4 Defendants' referrals of patients to their own physical therapy corporation
4 or business are unlawful under Washington's anti-rebate statute, constitute
5 unprofessional conduct, and violate Washington's Consumer Protection Act.

6 3.5 Defendant physicians profit from physical therapy care provided at BFPT
7 and/or BFOA's physical therapy office, which is unprofessional conduct and unlawful
8 under Washington's anti-rebate statute.

9 3.6 Defendant BFOA, defendant physicians, and BFOA employees are
10 engaged in business other than the rendering of professional services for which their
11 company was formed or for which they are licensed.

12 3.7 Defendant physical therapists practice physical therapy as part of a
13 company owned by physicians.

14 IV. CAUSES OF ACTION

15 4.1. RCW 19.68.010—anti-rebate. Beginning at least as early as 2003, the
16 exact date being unknown to Plaintiff, and continuing up to and including the date of this
17 Complaint, Defendants unlawfully referred patients to BFPT and/or BFOA's physical
18 therapy office. Given Defendant physicians' status as sole shareholders of BFPT
19 and/or BFOA, any profits or other gain BFPT and/or BFOA's physical therapy office
20 derives from providing physical therapy to patients inure to those physicians. Such an
21 arrangement violates RCW 19.68.010, which prohibits the receipt by Defendants of any
22 form of profit flowing from the referral of patients for treatment.

1 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.
2 Defendants' receipt of any profits or other valuable consideration resulting from its
3 ownership of BFPT and/or a physical therapy office constitutes unprofessional conduct
4 under RCW 19.68.020 and RCW 18.130.180.

5 4.3. RCW 19.86.020—Consumer Protection. Defendants' business practices
6 violate Washington's Consumer Protection Act. Specifically, Defendants engaged in
7 unfair acts and methods of competition when they created a physical therapy
8 corporation and/or opened a physical therapy office to which they could refer patients.
9 Defendants unlawfully refer patients to their own physical therapy office, thus unfairly
10 reducing the referrals to other area physical therapists, including Plaintiff Columbia.

11 4.4. RCW 18.100.010 et seq—Professional Services Corporation Act.
12 Defendant corporation and defendant physicians are engaged in business other than
13 the rendering of professional services for which their company was formed. Likewise,
14 Defendant physical therapists are not duly licensed to perform the same professional
15 services for which the company was formed.

16 4.5 Washington's Corporate Practice of Medicine Doctrine. Defendant BFOA
17 and its physicians violate the corporate practice of medicine doctrine by engaging in the
18 practice of a learned profession through licensed employees without legislative
19 authorization. Defendant physical therapists violate this doctrine by performing
20 professional services through a company without legislative authorization.

1 **V. PRAYER FOR RELIEF**

2 WHEREFORE, Columbia requests the following relief:

3 5.1. For judgment in favor of Columbia and against Defendants granting
4 injunctive relief against Defendants preventing further violations of RCW 18.130.180 (as
5 allowed under RCW 18.130.185) and RCW Chapter 18.100;

6 5.2. For judgment in favor of Columbia and against Defendants disciplining
7 Defendants for violating RCW 19.68.020 (as allowed under RCW 19.68.030);

8 5.3. For judgment in favor of Columbia and against Defendants for treble
9 damages and attorney fees resulting from Defendants' unfair acts and methods of
10 competition, in an amount to be proven at trial (as allowed under RCW 19.86.090);

11 5.4. For judgment in favor of Columbia and against Defendants and ordering
12 the immediate dissolution of Defendants' company;

13 5.5. For Columbia's attorneys' fees and costs incurred herein;

14 5.6. For such other and further relief as the Court deems just and equitable.

15
16 DATED this 5th day of June, 2007.

17 STAFFORD FREY COOPER

18
19 By: 

20 Darin Bailey, WSBA #34955
21 Danford D. Grant, WSBA #26042
22 Attorneys for Plaintiff
23

Certificate of Service

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled PLAINTIFF'S SECOND AMENDED COMPLAINT on the following individual(s):

Matthew T. Ries, 29407
Stamper, Rubens, Stocker & Smith, PS
Suite 200 Post Place
720 West Boone
Spokane, WA 99201
(509) 326-4800
FAX: (509) 326-4891
Attorneys for Defendants

☒ Via Facsimile
☒ Via First Class Mail
☐ Via Messenger

DATED this 5th day of June, 2007, at Seattle, Washington.


Lori Walsh

PLAINTIFF'S SECOND AMENDED COMPLAINT - 7
10268-027034 167656

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION
801 Union Street, Suite 3100
Seattle WA 98101-1374
TEL 206.823.9900 FAX 206.824.8885

The Honorable Dennis D. Yule

RECEIVED

JUL 19 2007

STAMPER, RUBENS
STOCKER & SMITH

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

v.

BENTON FRANKLIN ORTHOPEDIC
ASSOCIATES, P.L.L.C.; BENTON
FRANKLIN PHYSICAL THERAPY, INC.;
THOMAS R. BURGDORFF; CHRISTOPHER
A. KONTOGIANIS; ARTHUR E. THIEL;
DAVID W. FISCHER; HEATHER L. PHIPPS;
RODNEY KUMP; JAY WEST; and DOES 1
through 9,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S THIRD AMENDED
COMPLAINT

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1. Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2. Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington Professional Limited Liability Company doing business in the State of Washington as a medical office.

PLAINTIFF'S THIRD AMENDED COMPLAINT - 1
10268-027034 167656

STAFFORD FREY COOPER

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TEL 206.823.9000 FAX 206.824.9995

1 1.3. Defendant Benton Franklin Physical Therapy, Inc. (BFPT) is a Washington
2 corporation doing business in the State of Washington as a physical therapy practice.
3 State records indicate BFPT's corporate license expired on January 31, 2005; however
4 BFOA advertises that it continues to do business as "Benton Franklin Physical
5 Therapy."

6 1.4. Defendants Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
7 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; and Heather L. Phipps, D.O. are licensed
8 to practice medicine in the State of Washington. They are the physician-owners of
9 BFOA and Benton Franklin Physical Therapy (BFPT).

10 1.5. Defendants Rodney D. Kump, D.P.T. and Jay M. West, M.P.T. are
11 physical therapists at Benton Franklin Physical Therapy, and/or Benton Franklin
12 Orthopedic Associates d/b/a Benton Franklin Physical Therapy. Kump and West are
13 licensed to practice physical therapy in the State of Washington.

14 1.6. Other defendants, corporate or otherwise, designated as Does 1 through
15 9, are presently unknown to plaintiff, who therefore sues said defendants by such
16 fictitious names. Plaintiff is informed, believes and thereon alleges that each of the
17 defendants fictitiously named herein as a Doe are legally responsible in some manner
18 for the statutory violations hereinafter alleged. Plaintiff will seek to amend this
19 Complaint to insert the true names and/or capacities of said fictitiously named
20 defendants if and when the same have been ascertained.

II. JURISDICTION AND VENUE

2.1. This Court has jurisdiction over the parties and the subject matter of this lawsuit. Venue is proper in Benton County, Washington under RCW 4.12.025 as Defendants reside in Benton County.

III. FACTUAL BACKGROUND

3.1. BFOA is a physician-owned medical practice providing orthopedic medical treatment to patients. BFOA's main office is located at 911 South Washington Street in Kennewick, Washington. BFOA was formed in November 1999, and is owned by the following physicians: Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.; Arthur E. Thiel, M.D.; David W. Fischer, M.D.; Heather L. Phipps, D.O; and John and/or Jane Does 1-9.

3.2. Defendant physicians also own and operate Benton Franklin Physical Therapy, Inc. (BFPT) and/or a "BFOA physical therapy office" located at 15 W 10th Avenue in Kennewick. BFPT was incorporated on January 21, 2003. BFPT's corporate license apparently expired on January 31, 2005, and now BFOA advertises that "Benton Franklin Orthopedic Associates DBA Benton Franklin Physical Therapy." As a consequence of their ownership of BFPT, Defendant physicians have legal, financial, and managerial control over BFPT and/or the BFOA physical therapy office, to include the right to keep profits derived from BFPT's and/or the BFOA physical therapy office's physical therapy treatment of patients.

3.3. Defendant physicians refer patients for physical therapy to BFPT and/or the BFOA physical therapy office and the profits of this treatment inure to Defendant

1 physicians. Defendant physical therapists receive compensation from Defendant
2 physicians for providing physical therapy care to their patients.

3 3.4 Defendants' referrals of patients to their own physical therapy corporation
4 or business are unlawful under Washington's anti-rebate statute, constitute
5 unprofessional conduct, and violate Washington's Consumer Protection Act.

6 3.5 Defendant physicians profit from physical therapy care provided at BFPT
7 and/or BFOA's physical therapy office, which is unprofessional conduct and unlawful
8 under Washington's anti-rebate statute.

9 3.6 Defendant BFOA, defendant physicians, and BFOA employees are
10 engaged in business other than the rendering of professional services for which their
11 company was formed or for which they are licensed.

12 3.7 Defendant physical therapists practice physical therapy as part of a
13 company owned by physicians.

14 **IV. CAUSES OF ACTION**

15 4.1. RCW 19.68.010—anti-rebate. Beginning at least as early as 2003, the
16 exact date being unknown to Plaintiff, and continuing up to and including the date of this
17 Complaint, Defendants unlawfully referred patients to BFPT and/or BFOA's physical
18 therapy office. Given Defendant physicians' status as sole shareholders of BFPT
19 and/or BFOA, any profits or other gain BFPT and/or BFOA's physical therapy office
20 derives from providing physical therapy to patients inure to those physicians. Such an
21 arrangement violates RCW 19.68.010, which prohibits the receipt by Defendants of any
22 form of profit flowing from the referral of patients for treatment.

1 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.
2 Defendants' receipt of any profits or other valuable consideration resulting from its
3 ownership of BFPT and/or a physical therapy office constitutes unprofessional conduct
4 under RCW 19.68.020 and RCW 18.130.180.

5 4.3. RCW 19.86.020—Consumer Protection. Defendants' business practices
6 violate Washington's Consumer Protection Act. Specifically, Defendants engaged in
7 unfair acts and methods of competition when they created a physical therapy
8 corporation and/or opened a physical therapy office to which they could refer patients.
9 Defendants unlawfully refer patients to their own physical therapy office, thus unfairly
10 reducing the referrals to other area physical therapists, including Plaintiff Columbia.

11 4.4. RCW 25.15.045 (Professional Limited Liability Companies) and RCW
12 18.100.010 et seq—Professional Services Corporation Act. Defendant corporation and
13 defendant physicians are engaged in business other than the rendering of professional
14 services for which their company was formed. Likewise, Defendant physical therapists
15 are not duly licensed to perform the same professional services for which the company
16 was formed.

17 4.5 Washington's Corporate Practice of Medicine Doctrine. Defendant BFOA
18 and its physicians violate the corporate practice of medicine doctrine by engaging in the
19 practice of a learned profession through licensed employees without legislative
20 authorization. Defendant physical therapists violate this doctrine by performing
21 professional services through a company without legislative authorization.
22
23

1
2 **V. PRAYER FOR RELIEF**

3 WHEREFORE, Columbia requests the following relief:

4 5.1. For judgment in favor of Columbia and against Defendants granting
5 injunctive relief against Defendants preventing further violations of Washington's
6 corporate practice of medicine doctrine, RCW 19.68 *et seq.*, RCW 18.130.180 (as
7 allowed under RCW 18.130.185), RCW 25.15.045, and RCW Chapter 18.100 *et seq.*

8 5.2. For judgment in favor of Columbia and against Defendants for treble
9 damages and attorney fees resulting from Defendants' unfair acts and methods of
10 competition, in an amount to be proven at trial (as allowed under RCW 19.86.090);

11 5.3. For judgment in favor of Columbia and against Defendants and ordering
12 the immediate dissolution of Defendants' company;

13 5.4. For Columbia's attorneys' fees and costs incurred herein;

14 5.5. For such other and further relief as the Court deems just and equitable.

15
16 DATED this 17th day of July, 2007.

17 STAFFORD FREY COOPER

18
19 By: 

20 Darrin Bailey, WSBA #34955
21 Danford D. Grant, WSBA #26042
22 Attorneys for Plaintiff
23

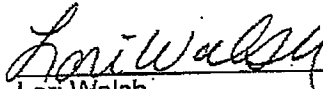
Certificate of Service

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled PLAINTIFF'S THIRD AMENDED COMPLAINT on the following individual(s):

Matthew T. Ries, 29407
Stamper, Rubens, Stocker & Smith, PS
Suite 200 Post Place
720 West Boone
Spokane, WA 99201
(509) 326-4800
FAX: (509) 326-4891
Attorneys for Defendants

☒ Via Facsimile
☒ Via First Class Mail
☐ Via Messenger

DATED this 17th day of July, 2007, at Seattle, Washington.


Lori Walsh

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

COLUMBIA PHYSICAL THERAPY, INC.,)
P.S.,)
Plaintiff,) NO. 05-2-01909-1

vs.)
BENTON FRANKLIN ORTHOPEDIC)
ASSOCIATES, P.L.L.C.; BENTON)
FRANKLIN PHYSICAL THERAPY, INC.;)
THOMAS R. BURGDORFF; CHRISTOPHER)
A. KONTOGIANIS; ARTHUR E. THIEL;)
DAVID W. FISCHER; HEATHER L.)
PHIPPS; RODNEY KUMP; JAY WEST; and)
DOES 1 through 9,)
Defendants.)

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THIS MATTER came before the Court on September 12, 2007, on Defendants' motion for summary judgment, and on Plaintiff's motion for summary judgment. The Court, having considered the pleadings filed herein, including:

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1. Defendants' Motion for Summary Judgment;
 2. Defendants' Memorandum in Support of Motion for Summary Judgment;
 3. Affidavit of Matthew T. Ries in Support of Defendants' Motion for Summary Judgment;
 4. Plaintiff's Response to Defendants' Motion for Summary Judgment;
 5. Declaration of Darrin Bailey in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment;
 6. Defendant's Memorandum in Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment;

ORDER RE: DEFENDANTS' AND PLAINTIFFS
MOTIONS FOR SUMMARY JUDGMENT: 1

STAMPER RUBENS PS
ATTORNEYS AT LAW

720 WEST BOONE, SUITE 200
SPOKANE, WA 89201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4890

7. Declaration of Michael H. Church in Support of Defendant's Reply Memorandum for Defendants' Motion for Summary Judgment;
8. Plaintiff's Motion for Partial Summary Judgment;
9. Plaintiff's Memorandum in Support of Columbia's Motion for Partial Summary Judgment;
10. Declaration of Darrin Bailey in Support of Columbia's Motion for Summary Judgment;
11. Response Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment;
12. Declaration of Michael H. Church in Support of Response Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment; and
13. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment.

After reviewing the foregoing pleadings, and hearing argument of counsel, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

1. Defendants' motion for an order of summary judgment to dismiss Columbia Physical Therapy, Inc., P.S.' claim that Defendants violated RCW 18.100.010 et seq. (Professional Services Corporation Act) and RCW 25.15.045 (Professional Limited Liability Companies) is **GRANTED**.
2. The Court does not rule on the application of the common law Corporate Practice of Medicine Doctrine and therefore neither grants nor denies the Plaintiff's and Defendants' competing summary judgment motions on the Plaintiff's common law Corporate Practice of Medicine Doctrine claim.
3. Defendants' motion for an order of summary judgment dismissing the claim by Columbia Physical Therapy, Inc., P.S. that Defendants' violated RCW 19.68.010 after the time period that operation of the physical therapy clinic was owned by Benton Franklin Orthopedic Associates, PLLC is **DENIED**.

STAMPER RUBENS P.S.
ATTORNEYS AT LAW

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

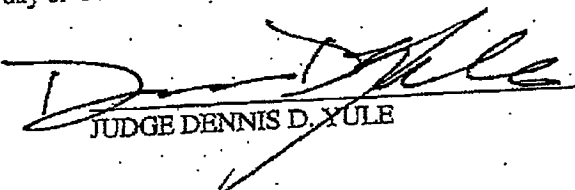
ORDER RE: DEFENDANTS' AND PLAINTIFFS'
MOTIONS FOR SUMMARY JUDGMENT: 2

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4. Plaintiff's motion for an order of summary judgment that the Court rule as a matter of law that the Defendants violate RCW 18.100.010 et seq. (Professional Services Corporation Act) and RCW 25.15.045 (Professional Limited Liability Companies) is DENIED.

5. Plaintiff's motion for summary judgment that the Court rule as a matter of law that the Defendants have violated RCW 19.86.010 is hereby DENIED.

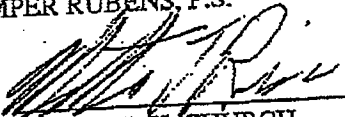
DONE IN OPEN COURT this 17th December day of October 2007.


JUDGE DENNIS D. XYLE

Presented By:

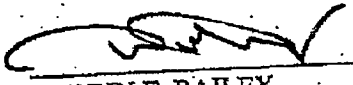
STAMPER RUBENS, P.S.

By:


MICHAEL H. CHURCH
WSBA #24957
MATTHEW T. RIES
WSBA #29407
Attorneys for Defendants

STAFFORD FREY COOPER

By:


DARRIN E. BAILEY
WSBA #34955
DANFORD D. GRANT
WSBA #26042
Attorneys for Plaintiff

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ORDER RE: DEFENDANTS' AND PLAINTIFFS
MOTIONS FOR SUMMARY JUDGMENT: 3

A-24

STAMPER RUBENS P.S.
ATTORNEYS AT LAW

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SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

The Honorable Dennis D. Yule

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

v.

BENTON FRANKLIN ORTHOPEDIC
ASSOCIATES, P.L.L.C.; BENTON
FRANKLIN PHYSICAL THERAPY, INC.;
THOMAS R. BURGDORFF; CHRISTOPHER
A. KONTOGIANIS; ARTHUR E. THIEL;
DAVID W. FISCHER; HEATHER L. PHIPPS;
RODNEY KUMP; JAY WEST; and DOES 1
through 9,

Defendants.

NO. 05-2-01909-1

STIPULATION AND ORDER TO
STAY PROCEEDINGS AND
CERTIFY DECISIONS FOR
DISCRETIONARY REVIEW

STIPULATION

The parties hereby stipulate to a stay of proceedings in this matter and to discretionary review of the Court's order regarding the Plaintiff's and Defendants' summary judgment motions argued before the Court on September 12, 2007, and review of the Court's April 4, 2007 decision denying Defendants' motion for summary judgment to dismiss plaintiff Columbia's Consumer Protection Act claim, and its RCW 19.68 claim, both of which were memorialized in the Court's October 17, 2007

STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 1

10266-022033 196170

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100

Seattle WA 98101.1374

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A-25

1 written Orders. Specifically, the parties respectfully ask the Court to stay the
2 proceedings for the purpose of appellate review, and to certify the following decisions
3 for discretionary review in the Court of Appeals:

4 1. The Court's denial of Columbia's motion for summary judgment on its
5 RCW 25.15 (RCW 18.100) claim, and the Court's granting of Defendants' motion for
6 summary judgment dismissing Columbia's RCW 25.15 (RCW 18.100) claim against the
7 Defendants.

8 2. The Court's ruling on both parties' motions for summary judgment on
9 Columbia's common law claim pursuant to the Corporate Practice of Medicine Doctrine;

10 3. The Court's denial of Columbia's motion for summary judgment on its
11 RCW Chapter 19.68 claim, specifically, the Court's apparent rejection of Columbia's
12 argument that RCW 19.68.040 applies only to similarly licensed professionals, and the
13 Court's decision that there is an issue of fact as to whether defendants' could satisfy the
14 supervision requirement under RCW 19.68.040.

15 4. The Court's denial of Defendants' motion for summary judgment to
16 dismiss Columbia's RCW Chapter 19.86 Consumer Protection Act claim and
17 Columbia's RCW 19.68 claim that the Court ruled upon on April 4, 2007.

18 5. The Court's September 12, 2007 denial of Defendants' motion for
19 summary judgment to dismiss Columbia's RCW Chapter 19.68 claims against the
20 Defendants.

21 Furthermore, the parties stipulate that if Defendants prevail on review regarding
22 Plaintiff's Consumer Protection Act claim, and the court enters judgment against
23 Columbia on (or orders dismissal of) Columbia's CPA claim, Defendants will voluntarily

STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 2
10263-027034 196120

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A-26

1 dismiss their Consumer Protection Act claim that is still pending in the trial court, leaving
2 no Consumer Protection Act claims of either party before the trial court.

3 In this case, discretionary review is appropriate because both parties believe
4 questions of law control the outcome in this case, and immediate review before trial
5 likely will resolve the matter in an efficient and less expensive manner than certain
6 appeal after trial. Furthermore, the questions at issue in this case have a statewide
7 impact on the delivery of health care services in Washington.

8 DATED this 17th day of October, 2007.

9 STAFFORD FREY COOPER

STAMPER RUBENS, PS

10 By: 

11 Darrin Bailey, WSBA #34955
12 Danford D. Grant, WSBA #26042
Attorneys for Plaintiffs

By: 

Michael H. Church, WSBA #24957
Matthew T. Ries, WSBA #29407
Attorneys for Defendants

13 ORDER

14 The Court, having read and considered the foregoing stipulation of the parties,
15 hereby certifies for discretionary review in the Court of Appeals its ~~October 17~~ December 17, 2007
16 Orders memorializing its September 12, 2007 and April 4, 2007 decisions on the parties'
17 motions for summary judgment. Furthermore, the Court hereby stays this matter until
18 further order of the Court.

19 DATED: 12/17/07


20 THE HONORABLE DENNIS D. YULE
21
22
23

STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 3
10268-0221034-196120

A-27

STAFFORD FREY COOPER

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1 Presented by:

2 STAFFORD FREY COOPER

3
4 By: 

Darrin E. Bailey, WSBA #34955
Danford D. Grant, WSBA #26042
Attorneys for Plaintiff

6 STAMPER RUBENS, PS

7
8 By: 

Michael H. Church, WSBA #24957
Matthew T. Ries, WSBA #29407
Attorneys for Defendants

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STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 4
10168-027034 196170

A-28

STAFFORD FREY COOPER

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601 Union Street, Suite 3100
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FILED

APR 11 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 267024

**COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON**

COLUMBIA PHYSICAL THERAPY, INC., P.S.,

Petitioner – Cross-Respondent,

v.

**BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C.;
BENTON FRANKLIN PHYSICAL THERAPY, INC.; THOMAS R.
BURGDORFF; CHRISTOPHER A. KONTOGIANIS; ARTHUR E.
THIEL; DAVID W. FISCHER; HEATHER L. PHIPPS; RODNEY
KUMP; JAY WEST; and DOES 1 through 9,**

Respondents – Cross-Petitioners.

JOINT MOTION TO MODIFY RULING

**DARRIN E. BAILEY
WSBA #34955
DANFORD D. GRANT
WSBA #26042
STAFFORD FREY COOPER
601 Union Street, Suite 3100
Seattle, WA 98101
(206) 623-9900
Attorneys for Petitioner**

**MICHAEL H. CHURCH
WSBA #24957
MATTHEW T. RIES
WSBA #29407
STAMPER RUBENS, P.S.
720 West Boone, Suite 200
Spokane, WA 99201
(509) 326-4800
Attorneys for Respondents
– Cross-Petitioners**

COPY

TABLE OF CONTENTS

I.	IDENTITY OF MOVING PARTIES.....	1
II.	STATEMENT OF RELIEF SOUGHT	1
III.	FACTS RELEVANT TO MOTION	4
IV.	GROUND FOR RELIEF AND ARGUMENT	5

I. IDENTITY OF MOVING PARTIES

Petitioner/Cross-Respondent Columbia Physical Therapy, Inc., P.S., (hereinafter "Columbia"), by and through its attorneys Darrin E. Bailey and Danford D. Grant of Stafford Frey Cooper and Respondents/Cross-Petitioners Benton Franklin Orthopedic Associates, P.L.L.C., Benton Franklin Physical Therapy, Inc., Thomas R. Burgdorff, Christopher A. Kontogianis, Arthur E. Thiel, David W. Fischer, Heather L. Phipps, Rodney Kump, Jay West and Does 1 through 9 (collectively referred to hereinafter as "Benton Franklin"), by and through their attorneys, Michael H. Church and Matthew T. Ries of Stamper Rubens, P.S., jointly ask this Court for the relief stated below.

II. STATEMENT OF RELIEF SOUGHT

The Parties jointly ask the court to modify the ruling of the Commissioner filed on March 12, 2008. The ruling denied the parties' cross-motions for discretionary review. Although the trial court certified its decisions for discretionary review and the parties stipulated to discretionary review, the Commissioner concluded that "the parties now disagree on what issues in the case were certified and should be decided by this court." In an effort to correct any perception that the parties disagree on what issues should be decided, the parties jointly identify the

following issues and ask this Court to grant discretionary review on these issues:

1. The trial court's denial of Plaintiff's motion for summary judgment on its RCW 25.15.045 and RCW 18.100 claim, and the trial court's granting of Defendants' motion for summary judgment to dismiss Plaintiff's RCW 25.15.045 and RCW 18.100 claim against Defendants, which requires ruling on the following legal question: As a matter of law, does RCW 25.15 (RCW 18.100) prohibit a single PLLC from providing both physician and physical therapy services to the public?
2. The trial court's determination on both parties' motions for summary judgment on Plaintiff's common law corporate practice of medicine doctrine claim, which requires ruling on the following legal question: As a matter of law, does Washington's Corporate Practice of Medicine Doctrine (or corporate practice of a learned profession doctrine) prohibit a physician-owned PLLC from providing physical therapy services to the public through licensed employees?
3. The trial court's denial of Plaintiff's motion for summary judgment on its Chapter 19.68 RCW claim, and the trial court's denials of Defendants' motions for summary judgment to dismiss Plaintiff's

Chapter 19.68 RCW claim, which requires ruling on the following legal questions:

- a. As a matter of law, do Defendants receive "a rebate, refund, commission, unearned discount or profit by means of a credit or other valuable consideration" in connection with the referral of patients or the furnishing of care as contemplated under RCW 19.68?
- b. As a matter of law, do Defendants' actions in this case constitute a "referral" as contemplated under RCW 19.68?
- c. If the answer to 1.a and/or 1.b is in the affirmative, then as a matter of law, does the exception in RCW § 19.68.010(2) apply in this case?
- d. As a matter of law, does RCW 19.68.040 apply only to similarly licensed professionals?
- e. As a matter of law, under RCW 19.68.040 does the "direct and immediate supervision" test set forth in *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969) apply in this case?
- f. If the answer to 1.e is in the affirmative, then as a matter of law, can Defendants satisfy the "direct and immediate supervision" test set forth in *Day*?

g. As a matter of law, do Defendants meet the "exception" set forth in RCW 19.68.040?

4. The trial court's denial of Defendants' motions for summary judgment to dismiss Plaintiff's Chapter 19.86 RCW Consumer Protection Act claim, which requires ruling on the following legal questions:

- a. As a matter of law, do defendants engage in "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" in violation of Chapter 19.86 RCW?
- b. As a matter of law does Plaintiff have standing to bring a CPA claim in this case?
- c. As a matter of law, is the CPA claim a stand alone claim if there is no violation of RCW 19.68 et seq.?
- d. As a matter of law, does the DOH investigation constitute a "specifically permitted" exception in RCW. § 19.86.170?

III. FACTS RELEVANT TO MOTION

The parties entered a Stipulation for discretionary review of the Benton County Superior Court's December 17, 2007 Order on Plaintiff's and Defendants' Summary Judgment Motions heard on September 12, 2007 and April 4, 2007. The Honorable Judge Dennis D. Yule of the

Benton County Superior Court signed an Order certifying its summary judgment decisions for discretionary review.

The parties filed their respective Motions for Discretionary Review with the Court of Appeals on January 7, 2008 and January 30, 2008, respectively.

The Commissioner reviewed the Motions, the responses and replies thereto, recognized that the parties had characterized their proposed issue statements differently, and concluded that the parties disagreed on what issues in the case were certified and should be decided by this Court. As a result, the Commissioner denied the Motions for Discretionary Review.

In an effort to correct any perception that the parties disagree on what issues the trial court certified, the parties have filed this Joint Motion to Modify Ruling, identifying the issues for discretionary review as stated in Paragraph II above.

IV. GROUND FOR RELIEF AND ARGUMENT

Discretionary review is appropriate in this case because the criteria of RAP 2.3(b)(4) are satisfied. This rule provides for discretionary review where:

The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review

of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4). In this case, the parties stipulated to appellate review, have presented agreed issues for appellate review, and the court certified its orders for appellate review.

The trial court's December 17, 2007 summary judgment order involves several controlling questions of law, as described above in the statement of issues. No appellate case in Washington has directly addressed the issues in this case. To the best of our knowledge, only two appellate cases in Washington have addressed claims under the Anti-Rebate Statute, and no appellate cases in Washington have addressed the impact of the corporate practice of medicine doctrine, the Professional Limited Liability Act, or the Professional Services Corporation Act on physician-owned companies that provide physical therapy services.

Finally, immediate review will materially advance the ultimate termination of this litigation. Both parties intend to eventually appeal if discretionary review is not granted. This case involves legal issues of statewide (and national) importance. Resolution of the purely legal issues in this case will likely resolve the litigation.

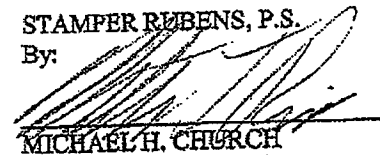
RESPECTFULLY SUBMITTED this 11th day of April, 2008.

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